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No. 89-354

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1989

THE REV. RALPH BROWN, Personal
Representative of the Estate of
Matthew Swan, Deceased,

Petitioner,

v.

JEANNE LAITNER, THE ESTATE OF JUNE AHEARN,
Deceased, and THE FIRST CHURCH OF CHRIST,
SCIENTIST, Boston, Massachusetts
(The Mother Church), a foreign
corporation, Jointly and Severally,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MICHIGAN

PETITIONER'S REPLY TO RESPONDENTS'
BRIEF IN OPPOSITION

DAVID R. PARKER
Counsel of Record

SHARON S. LUTZ
J. DOUGLAS PETERS
DAVID W. CHRISTENSEN
4000 Penobscot Building
Detroit, MI 48226
(313) 963-8080

Counsel for Petitioner



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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Respondents raise four grounds why this Honorable Court should not grant Petitioner's Writ of Certiorari. Two of those grounds, the third and fourth, have been adequately covered in Petitioner's brief accompanying his Petition for Writ of Certiorari. To briefly sum up Petitioner's argument on these points, the Michigan Court of Appeals' decision to allow Respondents' religious faith to serve as an absolute bar to the bringing of a civil suit conflicts with recent state court decisions discussed in Petitioner's certiorari brief. The First Amendment has not been interpreted, and cannot be interpreted, to provide an absolute blanket protection for practitioners of a given faith against civil suits based on their tortious conduct.

This reply brief will rebut the first two grounds brought by Respondents. Petitioner will show that his Petition was brought timely, and that the Michigan Court of Appeals' decision does not rest on independent and adequate state grounds.

I. THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY.

Respondents misinterpret Michigan Court Rules and the United States Supreme Court Rule 20.4 to create the appearance of untimeliness. Respondents do so by an improper juxtaposition of the rule governing rehearing and the rule governing reconsideration. As stated in MCR 7.313(D)(1), to move for rehearing, a party must file certain papers within 21 days after the *opinion* was filed. MCR 7.313(E), on the other hand, provides that motions

for reconsideration are brought for rehearing of a court order. Under Michigan Supreme Court practice, a motion for rehearing can only be brought where an *opinion* has been issued by the court. A party cannot request that the court rehear the issuing of an order; the only remedy for a court order, which a party feels was wrongly entered, is a motion for reconsideration. Therefore, the Michigan Court Rule practice of "reconsideration", being the only remedy by which an aggrieved party can attempt to persuade the court to rehear the issuing of an order, constitutes a "rehearing" as the term is used in Supreme Court Rule 20.4.

Respondents also place undue emphasis on the fact that a motion for rehearing postpones issuance of the court's judgment (MCR 7.313(D)(2)) while the filing of a motion for reconsideration does not stay the effect of the order addressed in the motion. (MCR 7.313(E)). This argument is irrelevant and misleading. In the case of a rehearing, by definition, the Michigan Supreme Court has issued an opinion. The opinion, by definition, supersedes the effect of any previous opinion. That is the reason that section (D)(2) provides for the postponement of the issuing of the court's judgment order. On the other hand, in the situation where the court has decided a case by issuing an order, 7.313(E) merely restates the general Michigan practice as set out in MCR 7.302(G), the rule governing application for leave to appeal to the Michigan Supreme Court. MCR 7.302(G) incorporates the rule of MCR 7.209(A), which states that an appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals

otherwise orders. It would be incongruous to hold that an appeal or application for leave to appeal in the Supreme Court does not stay the effect or enforceability of a judgment or order, but a motion for reconsideration of an order denying leave to appeal would do so. Instead, MCR 7.313(E) simply restates the standard Michigan practice: that the requesting of a review by the Supreme Court does not stay the effect of an order below, and an order denying leave to appeal (or one vacating a previously granted leave to appeal) cannot have greater staying effect than that of the motion for leave to appeal itself.

Supreme Court Rule 20.4 sets the time for filing the Petition for Writ of Certiorari as running from the date of denial of a timely motion for rehearing filed by any party in the case. Under Michigan Court Rule Practice, a rehearing of a court order is titled a Motion for Reconsideration. Because Petitioner filed a timely Motion for Reconsideration, the date for filing the Petition for Writ of Certiorari is determined from the date of the denial of the Motion for Reconsideration. Petitioner's Petition for Writ of Certiorari was timely filed.

II. THE DECISION BELOW DOES NOT REST ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Respondents argue that the Michigan Court of Appeals' decision rested upon adequate and independent state grounds. This is untrue. Although the Michigan Court of Appeals' opinion did make reference to Michigan statutes, the statutes were not interpreted or applied directly to the fact situation presented. The Michigan

statutes were looked to by the Court only to provide further insight into policy issues in dealing with First Amendment Freedom of Religion issues.

Concerns of federalism and avoidance of advisory opinions underlie the rule that this Court will not accept jurisdiction over an appeal from a state opinion based upon adequate and independent state grounds. As is often stated, interpretations of state law by a state's highest court are binding upon the U.S. Supreme Court. *California v Freeman*, ___ US ___, 109 S Ct 854, 856; 102 L Ed 2d 957 (1989), citing *O'Brien v Skinner*, 414 US 524, 531; 94 S Ct 740, 743; 38 L Ed 2d 702 (1974); *Murdock v City of Memphis* 20 Wall 590; 22 L Ed 429 (1875). Such concerns, however, are inapplicable to the instant petition.

It is undisputed that the trial court opinion rested solely upon First Amendment grounds. (See Appendix, Brief of Petitioner, pp 23-25). Although the Court of Appeals did make reference in its opinion to Michigan statutes, namely, the Michigan Medical Practice Act, MCL 338.1817 (repealed by 1978 PA 368, see now MCL 333.1617(d)), and Section 14 of the Michigan Child Protection Law, MCL 722.634, the interpretation of these statutes did not govern the disposition of plaintiff's claims. Furthermore, the consideration of these Michigan statutes was inextricably intertwined with consideration of the First Amendment Freedom of Religion issue in the opinion of the Michigan Court of Appeals.

In the very first paragraph of the Court of Appeals' decision, the panel states "the primary issue is whether U.S. Const, Am 1 and Const 1963, Art I, §4 preclude tort liability in this case where Christian Science practitioners,

by their acts or omissions, allegedly caused Matthew's death." (Petitioner's Appendix, p 28). There follows a discussion of First Amendment Freedom of Religion, distinguishing freedom to believe and freedom to act. (Petitioner's Appendix, p 41). Only then did the Court of Appeals look to the Child Protection Law and the Medical Practice Act (Petitioner's Appendix, pp 41-42), and only as an aid in the court's supposed "balancing" of free exercise religion rights and the rights of children to live. This "balance" was resolved by deciding that "the legislature has evidenced a policy in favor of the untrammelled exercise of good faith spiritual healing practices." (Petitioner's Appendix at 43). The Court of Appeals further noted that "we think that in this case we can conclude on the strength of the existing legislation, rather than *direct and sole* reliance on the constitutional guarantee, that public policy militates against providing a cause of action based on good faith spiritual healing practices." (*Id*; emphasis provided). Then, in conclusion, the Court of Appeals upheld the trial court's First Amendment dismissal of plaintiff's claim, holding "we are convinced that First Amendment religious freedom is inexorably implicated given the facts of the case. We conclude that the trial court followed the correct approach and properly granted summary judgment to defendants." (Petitioner's Appendix at 44).

As the language of the decision makes clear, this case is one in which the issues of state law referred to by the court are interwoven with federal constitutional considerations. In such cases, the decision of the state court does not rest upon an independent and adequate state ground. *Michigan v Long*, 463 US 1032; 103 S Ct 3469; 77 L Ed 2d

1201 (1983); *Zacchini v Scripps-Howard Broadcasting Company*, 433 US 562; 97 S Ct 2849; 53 L Ed 2d 965 (1977). While Michigan courts remain free to construe the Michigan Medical Practice Act and Child Protection Act in cases directly involving the application thereof, this Court is the final arbiter of the interpretation of the intertwined federal constitutional law, namely, the First Amendment Freedom of Religion. This is especially so in cases, such as the instant one, where the state court relies upon state statutes as an aid in deciding the intertwined federal constitutional question. *St. Martin Evangelical Lutheran Church v South Dakota*, 451 US 772; 101 S Ct 2142; 68 L Ed 2d 612 (1981).

First Amendment concerns color every word of the Court of Appeals' decision, including its discussion of the Michigan statutes. Further, First Amendment concerns constituted the entire basis of the trial court opinion, which was unequivocally affirmed by the Court of Appeals. The Michigan Court of Appeals' decision does not rest upon adequate and independent state grounds, and this Honorable Court is free to consider the issues raised in Petitioner's certiorari brief.

CONCLUSION

The Michigan Court of Appeals' decision rests upon an improper, absolutist interpretation of the First Amendment as precluding any tort liability being imposed upon churches or their practitioners, without any counterbalancing concern for the right of children to life and

good health. As such, federal concerns are clearly implicated, and this Honorable Court should grant certiorari so as to assist Michigan courts in the proper applications of those federal constitutional concerns.

Respectfully submitted,

CHARFOOS & CHRISTENSEN, P.C

DAVID R. PARKER
Counsel of Record

SHARON S. LUTZ
J. DOUGLAS PETERS
DAVID W. CHRISTENSEN
Counsel for Petitioner

4000 Penobscot Building
Detroit, MI 48226
(313) 963-8080